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¹ Organized opposition to judges and even the judiciary as a whole is as old as the republic, and there is an open debate about the extent to which today's political attacks and court curbing efforts represent (qualitatively or quantitatively) "new" forms of criticism. See Peabody 2010, 4-12.

Challenges and Opportunities of Judicial Independence Research

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It has been nearly a decade since Stephen Burbank and Barry Friedman edited their impressive volume, *Judicial Independence at the Crossroads*. One of the enduring lessons of that book was that research on judicial independence was, and ought to be, fundamentally interdisciplinary in nature. In the years since its publication, we have witnessed a substantial volume of research on the subject, and this work has certainly spanned multiple fields in law and the social sciences. Importantly, the questions that we are asking, the arguments we propose and the empirical tests we conduct are simply not all that different whether we are talking about American judges or judges abroad or even judges on international judicial bodies. Far from making us speak past each other, variation in sociopolitical and institutional context provides us leverage over the questions we seek to answer. Indeed, it is our view that as a scholarly subject, judicial independence raises concerns that are special cases of broader questions of institutional design. For these reasons, there is much to gain from conceiving of ourselves as writing in one coherent literature, linked not by region or governance system, but rather by the research challenges we confront.¹

This interdisciplinarity tempts us to question whether it makes sense to continue dividing scholarship on judicial independence, perhaps on law and courts generally, according to the traditional APSA subfields (i.e. American politics, comparative politics and international relations). Readers of other APSA subfield newsletters are no doubt familiar with the variety of symposia published over the years considering the usefulness of these distinctions. Typically, the answer is that they are not all that helpful. Yet, work goes on as before, naturally leading to a new symposium a few years later, where the same question is taken up. Rather than elaborate further on the subfield usefulness question here, we simply note that work on judicial independence is, in fact, productively interdisciplinary, and we will assume that it will continue to be so. Instead, we will ask what this feature of judicial independence research implies for the challenges facing the field of study and the way that we train our students.

Below, we briefly describe what we mean by research on judicial independence and suggest why we see a highly interdisciplinary endeavor. We then identify three challenges and opportunities posed by the nature of research on judicial independence. We then suggest two implications of this research agenda for undergraduate and graduate training. Quite obviously, judicial independence is far from the only concept worth contemplating. Nevertheless, we believe that the simple lessons we draw from our experience working in this thematic area likely have broader implications for our field.

Judicial Independence

Although this is not the place for a complete review of the concept, it is helpful to say a few things about what we mean, or better what other scholars often mean, by “judicial independence” especially since another lesson of the Burbank and Friedman volume is that “judicial independence” is vulnerable to multiple conceptualizations. We see three ways in which the term is commonly used. One approach is closely connected to a core feature of the rule of law: impartiality. A judge is conceived of as independent when she can decide cases free from bias in favor of one party or another. In international relations this notion of independence emerges in work on the decision-making patterns of international human rights judges (e.g. Voeten 2008) and in a broader conversation about the appropriateness of independent judges on international judicial bodies (e.g. Posner and Yoo 2005). And of course, Gregory Caldeira and James Gibson have produced considerable work on the perceptions and consequences of judicial impartiality both in the American context and abroad (e.g., Gibson and Caldeira forthcoming; Gibson et al. 2011; Gibson 2009; 1998).² Importantly, and especially in the American context, growing interest in the influence of campaign spending and activity has raised questions (of both a public policy and political science nature) about judicial impartiality. New York State’s recently-imposed restrictions on judges hearing cases where attorneys had contributed in excess of \$2,500 to the judge’s campaign are an example of the growing public scrutiny this issue is receiving.

A second approach draws on Nagel’s (1975) notion of power. Power can be described as “a causal relationship between preferences and outcomes,” so that we can say that a judge is independent when what she wants is the cause of how legal disputes are resolved (Cameron, 2002: 135). For this to be true, a judge must be both “autonomous,” in the sense that her decisions reflect her preferences and “effective” in the sense that those decisions actually control the outcomes of legal controversies. Scholars interested in the ways that the separation-of-powers system operates have typically adopted the power concept of independence (Vanberg 2005; Rogers 2001). This is the approach we have taken in our own research, which builds on work in both American and comparative politics, most notably that of Gibson and Caldeira and Vanberg.

We both address implications of a mechanism for judicial independence that ultimately relies on public support for courts. In Clark’s *The Limits of Judicial Independence*, he suggests that if the Supreme Court ultimately depends on public support, a central challenge it confronts involves learning about this support. He argues that congressional attacks on courts via so-called “court-curbing bills,” are indicators of waning public support. To the extent that Congress can credibly signal waning public support through the introduction of these bills, the Court will exercise self-restraint upon observing heightened congressional hostility. Critically, rather than serving as direct threats to the Court, court-curbing instead constrains the judiciary indirectly by communicating information about likely public support. Staton’s *Judicial Power and Strategic Communication* also considers an informational challenge judges confront if public support matters. When people are aware of particular interactions between judges and politicians, they can play a more direct role in constraining their representatives. So awareness, however constructed, is a critical piece of a public support story. For this reason, judges have incentives to raise awareness of their decisions in order to leverage public support. However, judges do not always prefer complete transparency. The reason is that voters can learn about judicial legitimacy from the interactions between courts and governments, and in political contexts (or episodes) where political constraints undermine impartiality; awareness, in these settings, can undermine public support. When this is true, judges prefer opacity.

Finally, judicial independence is also used to refer to a variety of formal institutional protections that are designed to induce impartiality or power or both. This distinction gives rise to familiar discussions over the occasional disconnects between *de jure* and *de facto* judicial independence. Although it is the convention to consider packages of these rules *de jure* independence, in our view, calling rules that might induce independent behavior “independence” further complicates the matter conceptually by combining two potentially related ideas. Judicial independence as a behavioral concept refers to the extent to which judges’ choices are self-determined and/or effective; rules like fixed tenure or budgetary autonomy refer to institutional structures we conjecture might be related to independence. Indeed, the extent of the relationship between these two concepts is the subject of much research on judicial independence, and in our view the fact that this (potential) relationship commands so much attention is strong evidence that they are conceptually different and ought not be called the same thing.

An example from another field is useful to see why. There is consistent evidence suggesting that permissive electoral rules like high district magnitudes encourage a greater number of political parties in the electorate; however, we do not call high district magnitude “party system fragmentation.” We simply describe it as a kind of electoral rule that influences the number of seats available in a particular district and then ask whether that number is causally related to the fragmentation of the party system. To be fair, if these concepts were perfectly correlated, then perhaps the distinction would be unhelpful as a practical matter; however, the connection between district magnitude and fragmentation turns out to depend on other features of state and society, and so beyond the issue of conceptual clarity, it is highly useful to keep the concepts separated. This is all the more important for judicial institutions that allegedly insulate judges from undue external influence, because studies looking for a strong relationship have been mixed, with some scholars finding some connection between rules and behavior and other scholars finding no such relationship (e.g. Hayo and Voigt 2007; Herron and Randazzo 2003). There is, of course, a long line of papers on the effects of formal legal institutions on economic growth and development (e.g. La Porta et al. 2004). And in American politics, there is considerable work on judicial selection mechanisms. This research has largely been concerned with the different incentives created by various selection mechanisms. In the American context, scholars have focused on how different electoral mechanisms condition judges’ responsiveness to public opinion when deciding cases (Caldarone, Canes-Wrone and Clark 2009; Hall 1992; Huber and Gordon 2007). Beyond the context of American states, scholars have considered the effects of various retention and promotion schemes for judicial independence (Ramseyer 1994; Ramseyer and Rasmusen 2003).

Challenges and Opportunities

The inherently cross-subfield and inter-disciplinary nature of the study of judicial independence presents important challenges to scholars. These challenges, as we will see, bring useful opportunities.

One challenge is that, simply put, the literature is big and seemingly expanding at an increasing rate. Because it is probably too much to ask all scholars to be deeply familiar with all aspects of this literature, size raises related challenges of not “reinventing the wheel” while not also reinforcing past errors. Consider approaches to measuring judicial preferences. In the American context, this issue has received considerable attention and while various difficulties associated with the task remain, much ground has been covered. As we know, scholars have used proxies, like the partisanship of appointers and editorials from major newspapers. Recently, the field has turned to more direct measures of preferences, using the IRT framework where we let voting patterns shed light on a judge’s position on a latent scale, which we often interpret ideologically. As more and more data is collected on judicial decisions abroad, scholars interested in theoretical arguments, the implications of which require measures of preferences, have naturally confronted the same challenges as their American colleagues. Unsurprisingly, it is not uncommon for comparativists to leverage appointer partisanship in order to measure judicial preferences, which may or may not be a good proxy for ideology in particular contexts. More recent work in IR and comparative politics has adopted the IRT approach (e.g. Voeten 2008; Sánchez et al. 2011). Borrowing of this sort is certainly appropriate in some contexts, but we do have to be careful about the context. Most obviously, the typical IRT approach assumes the attitudinal model—that judges are ideologically motivated and vote sincerely. For some research questions, this is an innocuous assumption. Yet scholars often wish to use estimates of preferences to then test decision-making hypotheses where justices are assumed to vote strategically. This is an obviously tenuous

approach, clearly inconsistent with the theory motivating the design. No matter the theory we are trying to test, though, this issue is particularly salient as scholars investigate judges in locations where the incentives for prudent decision-making are far stronger than they are in the American context. The concern here is that in our effort to not reinvent the wheel, to take advantage of new and careful approaches to estimating preferences, we risk using these methods inappropriately. On the other hand, we are confronted with a genuine opportunity. The increasing availability of data outside the United States, especially in places where we are very confident that judges confront serious political constraints, provides opportunities for scholars to develop methods for measuring preferences from observed behavior in ways that are sensitive to strategy.

A second, and related, challenge is that once we start opening up our research paradigm to work in alternative substantive areas, it can become clear that our work is really just a special case of a broader phenomenon. For example, many of the questions concerning the creation of independent courts have parallels in the study of central bank independence or bureaucratic independence. This only highlights the extent to which judicial independence studies are often a special case of larger institutional design problems. As another example, consider studies of compliance with judicial decisions. This topic has received considerable attention in both the American and comparative contexts. Far too infrequently, though, are the connections successfully made between the literature on compliance and courts and the literature on bureaucracy and compliance. However, it seems apparent that the two bodies of research should have direct implications for each other. Thus, as the onus is on the researcher to expose oneself broadly to many literatures, so too is there a burden on each of us to write and present our research in a way that allows the connections to other fields to be as fruitful as possible.

A third challenge for scholars concerns the possibility of a disconnect between research on judicial independence and the deep, historical motivations for that research. Judicial independence (in whatever form you may like) often seems to be studied (or promoted) as a goal in-and-of-itself. Yet as Cameron (2002) notes, we are interested in the concept because we have the sense that it might very well be linked to normatively appealing ends, e.g. economic growth, development, the protection of human rights, perhaps happiness. Essentially we care about judicial independence because we care about the “good stuff” it provides. The key consequence of this disconnect is that scholars of judicial independence risk failing to communicate their findings effectively to scholars who don’t really care about independence *per se* but do care about, say, development and human rights. This is problematic in two ways. It means that we are simply failing to publicize results that are interesting in their own right. More importantly, judicial independence research has implications for research on these broader subjects. One salient example is that comparative research has found considerable variation in links between formal institutions that allegedly insulate judges and independent judicial behavior. This immediately raises questions about cross-national development research that makes use of formal institutions (e.g. La Porta et al.). The rules that we think induce independence either do not do so, or they do so in different ways in different contexts, or they incentivize behavior that advances independence on one hand and undermines it on the other (Helmke and Staton 2011). For this reason, it is unclear what to conclude exactly from research designs that use formal institutions as proxies for independent behavior in all contexts. At a minimum, development scholars would do well to become familiar with the process by which courts become or maintain independence so that their measurement models have some connection to the process(es) that we believe produce independence. It is our responsibility to ensure that they can do this easily.

Implications

The concepts, questions and tools that characterize the study of judicial independence across the various subfields and disciplines are closely related. Perhaps more important, the various approaches can all have implications for each other. As we argued above, the interdisciplinarity we see presents challenges for us, but it also creates opportunities. It also has direct implications for how we teach our students and train future scholars. The key is to think about breadth. Yet we need ways of training students that encourage them to be *productively* involved in a broad research enterprise without undermining detailed knowledge of particular cases and issues.

Insofar as law and courts suggests a theme rather than a region or system of governance, we believe strongly that the subfield more generally benefits from productive cross-field exchange. The question is how to structure training to help our students best take advantage of this setting. At Emory, we have tailored our instructional approach to address implications of our view of the field. Here we discuss two. The first implication, what we take to be the most obvious, is that we benefit from a substantively broad curriculum framed around core theoretical problems that manifest in a variety of subfields in related if not totally identical ways. At the undergraduate level, we have both taught courses on judicial politics that are organized thematically, rather than by region or governance system. We have found that students are more likely to learn a lesson about, say, institutional design or legal mobilization, when it is pitched generally and when they can find examples in the particular context they find most interesting than when we teach the same lesson anchored to a particular place.

We have also expanded our undergraduate constitutional law sequence. We now teach a course on comparative constitutional law, which builds upon and compliments Thomas Walker's classes on the American system. As is true in Walker's course, the comparative course links core issues of constitutional interpretation to general questions about the nature and challenges of constitutional governance. At a minimum, by evaluating how different societies have resolved the very same constitutional questions, we both clarify lessons learned about the American approach and give students the opportunity to question that approach in light of genuine alternatives.

At the graduate level, we regularly teach a seminar on political institutions framed around common social and political dilemmas. For example, during one week we study commitment problems; during another we study coordination problems; we devote two weeks to principal-agent problems, etc. For each topic, substantive examples from myriad subfields are examined in concert, highlighting the theoretical and empirical linkages among the questions. In pushing our students to think about social phenomena outside of any one particular substantive focus, the course reinforces claims about productive interdisciplinarity in the study of institutions that we pitch from day one.

All of our law and courts students take this institutions course, but we should stress that it is intended for all students in our program. Still, the benefits for our judicial politics students are clear. A student interested in judicial independence, for example, would not only be encouraged to think about work on the subject done across the fields, but she would be pushed to think about what she might learn from research on central banks or bureaucracies. Further, since we expose the students to work in political economy on the connections between legal institutions and broad development outcomes, our approach requires that students think about concepts like judicial independence as potential means to ends rather than merely ends. It also encourages them to think about how work on independence might inform the broader literature.

A second implication, especially relevant at the graduate level, is that participating in (perhaps even constructing) a vibrant intellectual community is even more important than ever. Though increasing interdisciplinarity means that students benefit from a broad understanding of our discipline, it does not follow that they should be (or could be) experts in every literature, much less experts in the dominant methods of these literatures. You simply cannot know everything. But for that reason, cultivating a vibrant network of colleagues is critical. This much should be obvious. What is not, at least what was not obvious to us when we were graduate students, much less first year graduate students, was how to be a good member of a network. And we certainly had no idea about how to build one.

At Emory, we believe it is important not only to model professional behavior in an intellectual community, but to provide explicit training about how to do so. This means that in addition to designing a sequence to ensure quality research, we must teach how to present research, how to read and constructively evaluate research, how to engage research and provide useful comments, and how to take advantage of opportunities to meet like-minded graduate students and faculty. Part of this is done by directly building important activities into syllabi, as, say, by requiring peer evaluation assignments and setting up mini-conferences or poster sessions at the end of classes

where students can present their work. Another piece is advanced by constructing speaker series and working groups that are not aimed at a particular subfields and where the entire department is encouraged to attend. Like our colleagues elsewhere, we suppose, we also remind each other to seek out opportunities for our students to meet their peers at other institutions and eventually to expose their research to valued colleagues in settings that cultivate serious scholarly exchange. And some of this training we provide via workshops, on, for example, the general structure of a research presentation, on doing good reviews and even on the standard ways through which we go about meeting like-minded scholars. The point is that if networks matter, then we need our students to know how to engage them. We can do better than simply modeling how to participate in and build networks in the hope that some set of our students will “figure it out.” We can provide explicit training.

Conclusion

The bottom line for us is that because the study of judicial independence is interdisciplinary and increasingly so, judicial scholars confront important challenges but also have corresponding opportunities. The commonality of the challenges we have reviewed is that they all imply that scholars need to remain mindful of the larger context in which their research is situated. From issues of theory to measurement to substantive interpretation, many of us are concerned with questions that the field cares about—it is our responsibility to conduct and frame our research in ways that allows us to clarify why the scholars who value the issues that we value should care about the particular contributions we are making. To do this well as we move forward, we also need an approach to training that gives our students the best possible chance to have a broad impact. In our view, we can advance this goal best via a broad curriculum and an approach to professionalization that specifically trains how to be a productive member and ultimately take advantage of a network of likeminded scholars.

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¹ For a more complete treatment of this claim, please see Staton and Moore (Forthcoming).

² The research agenda on procedural justice, led largely by Tom Tyler, seems particularly relevant as well.

Judicial Independence in Authoritarian Regimes: The China Experience

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Notwithstanding nearly universal support for the notion of judicial independence, the concept remains disturbingly contested and unclear even in economically advanced liberal democracies known for the rule of law. The conceptual and practical problems are magnified for developing countries and non-liberal authoritarian regimes.